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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1328

BOROUGH OF DOYLESTOWN, *Petitioner*

v.

DONALD BRADSHAW, ALFRED CUNEO and CAROLE CUNEO, BRUCE D. RAWLINGS, DELAWARE VALLEY COLLEGE, MARJORIE E. MOYER t/a SUNNY BEVERAGES, and MAENNERCHOR SOCIETY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Borough of Doylestown, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit reversing the Judgment of the trial court and entering judgment in favor of Delaware Valley College, and affirming the Judgment of the trial court as to petitioner Borough of Doylestown.

CITATION OF OPINION BELOW

The Opinion of the Court of Appeals, Bradshaw, Donald; Cuneo, Alfred and Cuneo, Carole v. Bruce D. Rawlings, Gilbert D. Rawlings, Borough of Doylestown,

Pennsylvania, Delaware Valley College, Majorie E. Moyer t/a Sunny Beverages, Maennerchor Society, and Saab Motor Company, has not been officially reported and is set forth in the Appendix at page A1. The Opinion of the District Court, Bradshaw v. Rawlings, is reported at 464 F.Supp. 175 (E.D. Pa. 1979).

JURISDICTION

The Judgment of the Court of Appeals reversing in part and affirming in part was entered on December 17, 1979. A Petition for Rehearing filed on December 31, 1979 was denied by Order entered January 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in reversing the judgment against Delaware Valley College on the basis of generalized state policy advanced by Amici Curiae which was not raised by the parties or decided by the trial court, and adopting that policy as the applicable state law?

2. Did the Court of Appeals err in advancing the possible liability of respondent Borough of Doylestown on other grounds as a basis for affirming a judgment against the Borough where the trial court permitted the jury to base its verdict against the Borough on the ground which the Court of Appeals regarded as improper?

3. Did the Court of Appeals err in adopting as the applicable law of the state the requirement that municipalities reconstruct long existing city streets or suffer liability for injuries connected with a condition of the street as initially constructed which was entirely proper when the street was laid out fifty years earlier?

STATEMENT OF THE CASE

This is a personal injury case which resulted in jury verdicts in favor of the plaintiff-respondent Donald Bradshaw and his parents against petitioner-defendant Borough of Doylestown (the Borough) and against re-

spondent-defendants Rawlings, Delaware Valley College (the College) and Marjorie Moyer t/a Sunny Beverages (Sunny) in the total amount of $1,118,067. Motions for new trial and directed verdict were denied on December 17 1979 and on appeal the Court of Appeals reversed the Order of the trial court and entered Judgment N.O.V. in favor of the College, while affirming the judgments against petitioner, the Borough, Rawlings and Sunny Beverages. Suggestion for Rehearing In Banc and Petition for Rehearing were denied by the Court of Appeals.

Bradshaw was a back-seat passenger in an automobile driven by Rawlings and was injured when Rawlings lost control of his automobile and struck a parked car. At the time, they were on their way home from the annual picnic of the sophomore class of Delaware Valley College, and both were members of that class. Rawlings was intoxicated as a result of beer he had imbibed at the sophomore class picnic.

The sophomore class was an organization recognized and supervised by the College and was admitted by the College to be a college related activity. The College provided a class advisor who supervised the activities of the class and who controlled its funds. As a part of his duties the advisor was expected to attend and supervise the picnic but he failed to do so. The College knew that, contrary to its express rules, beer had been provided at prior yearly picnics, and the College in this case participated in the preparations for the picnic, including the provision of copious amounts of beer, by approving and displaying fliers announcing the picnic and the presence of beer and by approving the expenditures of class funds for the purchase of the beer. The quantity of beer provided for consumption at this picnic was sufficient to supply as much as eight quarts for each person attending the picnic, and all of it was consumed at the picnic.

The College made no attempt in any way to supervise the activities or the picnic. The class advisor failed

to attend and failed to procure a substitute because the officers of the class indicated they did not desire one.

Bradshaw knew of the intoxicated condition of Rawlings and Rawlings was seen to be driving erractically prior to leaving the picnic grounds. The picnic was held off-campus, at a location which was accessible only by automobile. On the way back to the college from the picnic site, Rawlings drove through the streets of the Borough of Doylestown on one of which the accident occurred. It was contended by the various parties at trial that the College was negligent in failing to supervise the sophomore class picnic, that Rawlings was liable for negligent driving and because of his intoxicated condition, that the Borough was liable for the condition of its streets and for failing to warn of that condition, and that Sunny was liable for knowingly providing the beer to minors. At trial the College contended it was not liable because it had no duty to supervise an admittedly college-related activity unless the activity involved was inherently dangerous; the Borough contended that it could not be held liable for the condition of the streets since it was admitted that the condition relied upon was a part of the design and original construction of this street fifty years earlier, there being no evidence whatsoever that it was in any way improper at that time, and that it could not be held liable for failure to warn where it was undisputed that both Rawlings and Bradshaw were well aware of the existence of the condition.

On appeal the College asserted as error only that the trial court erred in failing to charge that its duly to supervise this activity applied only if the activity was inherently dangerous and that it was entitled to judgment as a matter of law because the activity was not inherently dangerous. but Amici Curiae entered the case and argued that colleges were not in loco parentis and therefore had no duty to supervise Rawlings' activities. The Appellate Court adopted the argument of Amici Curiae and, upon a general review of statutes and cases expand-

ing the rights of those under twenty-one and involving student rights and that a weighing of the competing interests of the student and an institution of higher learning, concluded that in these changing times the College had no custodial responsibilities of its students because they had reached the age of majority (eighteen years in Pennsylvania) and were capable of protecting their own self interests, and that Pennsylvania would not impose upon the College any duty to regulate Rawlings' activities. The Court of Appeals therefore reversed and entered judgment in favor of the College. On the other hand, the Court affirmed the verdict against petitioner, the Borough, rejecting the Borough's contention that it was error to permit a finding against it on a theory of lack of warning where it was undisputed that Rawlings and Bradshaw were already aware of the condition, because the Court of Appeals concluded that failure to warn was only one of alternative theories advanced by the plaintiff against the Borough, including possible liability for negligence in maintaining the street in the same condition it was when properly constructed fifteen years earlier.

The Court of Appeals therefore reversed the verdict against the College on a ground not advanced in the court below nor on appeal by any of the parties, first introduced on appeal by Amici Curiae, in reliance only upon a broad general review of what it considered would be the view of the state law based only upon a general view of unrelated matters involving the expanding rights of students and other persons under twenty-one, and affirmed the judgment against the petitioner-Borough by rejecting its contention with regard to non-liability for lack of warning because liability could have been found by the jury on an alternative ground, and by advancing as that alternative ground the liability of a municipality for failing to reconstruct its older streets to meet traffic conditions and design concepts applicable under present conditions. The Court of Appeals did not even discuss the important contention of the Borough that under ap-

plicable Pennsylvania law the municipality was not required to reconstruct its streets to avoid liability for injuries caused by a condition of a street which was properly designed and built fifty years earlier.

ARGUMENT

I. THE ADOPTION BY THE APPELLATE COURT AS THE APPLICABLE STATE LAW OF A RULE OF LAW BASED ONLY UPON THAT COURT'S VIEW OF BROAD GENERAL POLICY ON AN ISSUE NOT RAISED BY ANY OF THE PARTIES BUT RAISED FOR THE FIRST TIME ON APPEAL BY AMICI CURIAE TO EXONERATE ONE OF THE DEFENDANTS FROM LIABILITY, AND ITS IMPOSITION OF A PREVIOUSLY NON-EXISTENT LIABILITY UPON A MUNICIPALITY BY HOLDING THE PETITIONER TO BE LIABLE WITHOUT CONSIDERATION OF APPLICABLE STATE LAW, PRESENT IMPORTANT ISSUES AS TO THE PROPER FUNCTION OF THE FEDERAL COURTS IN CREATING AND APPLYING STATE LAW IN DIVERSITY CASES AND THIS COURT'S ROLE IN SUPERVISING AND CONTROLLING THE EXERCISE OF THAT FUNCTION WHICH ARE OF GREAT IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS WHICH HAVE NOT BEEN HERETOFORE ADEQUATELY CONSIDERED BY THIS COURT AND TO WHICH THE COURTS OF THE VARIOUS CIRCUITS HAVE APPLIED DIFFERING PRINCIPLES.

A. This Court Has Not Previously Adequately Performed its Role in Supervising and Controlling the Exercise by the Federal Trial and Appellate Courts of Their Function as the Creators or Appliers of Applicable State Law in Diversity Cases.

This Court has not, since its decision in *C.I.R. v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L. Ed.2d 886 (1967), examined or considered either the lower federal court's function in determining and applying state law in diversity cases or this Court's role in supervising the exercise of that function, and even there the case was within the federal question rather than the diversity jurisdiction of the federal courts. The issue in the cases then presented to the Court was the role of the federal court in making determinations of applicable state law where state law was imported into federal law because state law affected property rights upon which the determination of the application of federal law depended. There the result under the federal law depended upon acquiescence in or divergence from rulings of state trial courts in adjudicating the taxpayers' property rights *inter se* and determining whether the transactions involved qualified for marital deductions under federal law. The particular state court adjudications were not adversary proceedings, and this Court stated that in diversity cases rulings of lower state courts should be attributed some weight but such decisions were not controlling where the highest court of the state had not spoken on the point, that the decisions of intermediate appellate state courts constitute data for ascertaining state law which were not to be disregarded by federal courts unless convinced by other data that the highest appellate court of the state would decide otherwise and the federal courts were not bound by those decisions, and that in diversity cases the state's highest appellate court is the best authority on the law of that state but in the absence of decision on a particular point the federal courts must apply what they find to be the state law after giving proper regard to other relevant rulings of other courts of the state. The Court also pointed out that ordinarily it would accept the determination of local law by the Court of Appeals.

These statements of principle have since been cited by the federal courts as the touchstones of their role in applying state law in diversity cases, and the decisions of Courts of Appeals in applying state law in a diversity case has since gone unexamined and uncontrolled by

this Court. Free from examination or control of their decision and the exercise of their function, the Court of Appeals, it is submitted, assumed an ever increasing role in determining not what the applicable state law is but what it should be, and relying upon what the Courts of Appeals feel is the general policy of the state to justify a decision which would otherwise require acknowledgement of the fact that the particular court is adopting a new or changed principle as the applicable state law.

In so doing, the Courts of Appeals have relied upon divergent principles as encompassing a statement of their proper function in diversity cases, with the net result that they have assumed the role of both policymaker and lawmaker for the states.

B. The Courts of Appeals are Widely Divergent in Their View of the Principles Governing their Application of State Law in Diversity Cases.

Some Courts, notably the Tenth Circuit, rely heavily upon the rulings of the trial judge in the case under adjudication on the grounds that his expertise in determining and applying state law better qualifies him to make ruling on what the applicable state law is, and decline to disturb the trial judge's rulings unless it views them as "clearly erroneous." *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977); *Chavez v. Kennecott Copper Corp.*, 547 F.2d 541 (10th Cir. 1977). When confronted with a decision of an intermediate appellate state court the Circuit Courts regard that decision in varying lights.

The intermediate appellate decision is sometimes relied upon and followed unless the court is persuaded that the highest appellate court has expressly or impliedly altered its position on the issue; *Reeg v. Shaughnessey*, 570 F.2d 309 (10th Cir. 1977). The decision of an intermediate appellate court is sometimes regarded as controlling in the face of a strong contrary majority trend in other jurisdictions; *Garris v. Schwartz*, 551 F.2d 156 (7th Cir. 1977), while the Third Circuit ap-

parently feels free to disregard an intermediate appellate court decision on the ground that it is only evidence and not automatically controlling and it is free to reach a contrary result if it finds the decision not well reasoned or if other "pertinent data" leads to a belief that the highest court would hold otherwise. *National Surety Corp. v. Midland Bank*, 551 F.2d 21 (3rd Cir. 1977). On the other hand, the decision of an intermediate appellate court is sometimes relied upon in the face of a contrary decision by the highest court of a state "in the absence of convincing evidence that the highest court of the state would decide differently" where the federal court finds the later intermediate decision in line with state policies expanding the scope of tort liability. *Community Nat. Bank v. Fidelity & Deposit Co.*, 563 F.2d 1319 (9th Cir. 1977). These various statements of the underlying principles, but particularly the varying results in following or not following prior state court decisions regardless of what principle is stated, result in varying degrees of adherence by the federal courts to state law as previously expounded the state courts. The federal courts evidence widely divergent degrees of reliance or non-reliance upon state court decisions and it is submitted that consideration of the effect to be given to state law and the decision of a state court and the applicable principles should be considered and decided by this Court.

C. The Courts of Appeal are Increasingly Becoming the Arbiters of What the State Law Should be Rather than What the State Law is.

The general conception by the federal courts of their role is that they are not the formulators of the law of the state in diversity cases and do not make policy for the state, but that conception is frequently belied by the decision rendered.

The classic statement of the role of the Federal Courts is that by Justice L. Hand in *Spector Motor Service v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1923): that it is

not the function of a federal court "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." The proper function of the Federal Court is to ascertain what the state law is, and not to speculate about what it will be. *Hausman v. Buckley*, 295 F.2d 696 (2d Cir. 1962); it is not the function of a Federal Court to participate in a change of state law if it can be persuaded to doubt the soundness of the existing doctrine. *Seiberg v. Raymond*, 544 F.2d 14 (1st Cir. 1976). Thus one court may continue to adhere to a rule of law that in malpractices case an expert may not testify unless he testifies on the basis of the appropriate standard of a particular locality even though other jurisdictions regard that rule as outmoded, because it is not the Court's function to formulate the law of the state, *Reeg v. Shaughnessy, supra*, or to adhere to an outmoded conflicts of law doctrine applying the law of the place where the accident happened rather than the law of the place of the most significant contracts, *Mills v. Hoflich*, 465 F.2d 29 (10th Cir. 1972), and one court is constrained not to indulge in an expansion of tort liability, *Amfac Mtg. Corp. v. Arizona Mail of Tempe*, 583 F.2d 426 (9th Cir. 1978), while another court feels free to expand the tort liability contrary to prior decisions on the ground that it is convinced that the expansion is in line with the general policy of expanding the scope of tort liability and favoring the imposition of liability. *Community Nat. Bank v. Fidelity & Deposit Co., supra.* at 1321-2. Some judges would feel free to expand such liability in total disregard of prior state court for decisions and the views of the majority of their own court for the sole reason that the basic purpose of tort law is to afford compensation wherever injuries are sustained by one person as a result of the conduct of another. *Garris v. Schwartz, supra.* at 159 (Bell, J., dissenting).

As set forth in the succeeding section, the Third Circuit feels especially free to regard its conception of

general state policy as the basis for its decision on state law, as it did in this case, and its decisions here and in other cases are illustrative of the increasing involvement of the federal courts in making state law and state policy.

The increasing involvement of the courts under this Court's jurisdiction in changing state law and developing state policy as a basis for decision in a particular case require the intervention of this Court.

D. The Court of Appeals Erred in Relying Solely upon its Conception of State Policy and its Decision in this Case and Previous Cases Require that, in the Proper Administration of Justice in the Federal Courts, this Court Intervene and Examine the Basis for its Decision.

The Court of Appeals erred in its holding as to the non-liability of the College both in basing its decision solely upon what it conceived to be the broadest general policy of the state and in deciding on that basis where the issue was not raised by any of the parties and was raised only on appeal by Amici Curiae.

At the trial the College conceded that the sophomore class picnic was a college related activity; the evidence clearly established involvement of the College in planning, supporting and sanctioning both the picnic and the purchase of the beer which was consumed by Rawlings, and the negligence of the College in totally failing to supervise that picnic. At the trial, and on appeal, the College argued only that it had no duty to supervise the picnic because that duty only applied where the activity itself was inherently dangerous. The trial court charged, without any exception by the College or the other parties, that the College had the duty to exercise reasonable care under the circumstances and declined to charge that the College did not have a duty unless the picnic was found to be inherently dangerous. On appeal the College made only the same contentions; that the failure of the trial court to include a requirement that

the activity involved be inherently dangerous in its charge constituted grounds for a new trial and that the College as a matter of law could not be found liable because the activity was not inherently dangerous. The Appellate Court however permitted The Pennsylvania Association of Colleges and Universities and American Council on Education to File a brief as Amici Curiae. It was only in that brief that the contention espoused by the Court of Appeals was first advanced.

The Amici Curiae argued that an institution of learning could not be held liable for failure to regulate the off-campus conduct of its student Rawlings in operating his automobile because that institution was not in custody or *loco parentis* with respect to Rawlings and could not control his driving, ignoring the fact that the real issue and the issue as the case was tried below was whether or not the College was negligent with respect to its own activities in connection with the college-related picnic of its sophomore class. None of those who were actually parties to the case ever asserted that the College might be found liable for failure to regulate the conduct of Rawlings; the only contention advanced was that the College had the duty common to all persons and institutions to act reasonable under the circumstances and had breached this duty by failing to exercise that reasonable care in supervising the sophomore class picnic. Those opposed to the college relied upon decisions of the highest appellate courts of other jurisdictions imposing upon such institutions the duty to supervise college-related activities, *Carrabba v. Anacortes School District*, 435 P.2d 936 (Wash. 1967), *Chappel v. Franklin Pierce School*, 426 P.2d 471 (Wash. 1967); *Sherwood v. Moxee School District*, 363 P.2d 138 (Wash. 1961); and upon *Hanson v. Reedley Joint Union High School*, 111 P.2d 415 (Cal. App. 1941), and the generally applicable law that a school does have a duty to exercise due care in its supervision of class-related activities. 15 *Am. Jur.* 2d, Colleges and Universities, §40, p. 307. They also relied

upon a decision of the Middle District of Pennsylvania in *Stephenson v. College Misericordia*, 376 F.Supp. 1324 (M.D. Pa. 1974) under Pennsylvania law which found no liability but based its judgment on the fact that there was no evidence of negligence rather than that there was no duty to supervise the activity.

The Court of Appeals here ignored the contentions of all of the parties and the applicable law. It took as its beginning point the proposition that a college is not an insurer of the safety of its students, and then proceeded to review the college society in general, noting that college students are now regarded as adults for the purposes of purchasing alcohol, marrying, making wills and contracts, driving emergency vehicles, practicing as accountants and veterinarians and practical nurses and joining the militia (Op. A7-8) from all of which is concluded that colleges were no longer in *loco parentis* to their students. The Court then proceeded to the process of what it denominated as identifying the competing interest in the student college relationship, and concluded that it did not constitute the special relationship which the court felt was a necessary prerequisite to the imposition of liability upon the College for breach of a duty to control the conduct of Rawlings in his off-campus driving. (Op. A9-12). Naturally, it found that there was no duty.

Although it mentioned the previously cited cases as some indication that the courts of Pennsylvania might impose liability if the students were younger, the Court of Appeals cited as its sole authority the statements of Professor Proser that negligence in the air does not impose any duty and that the term 'duty' is only an expression of the sum total of considerations of policy which lead the law to state that a particular plaintiff is entitled to protection. (Op. A6).

The Opinion dismissed the universally acknowledged proposition that everyone, colleges included, has a duty to use due care under the circumstances on the

grounds that the trial court "apparently assuming that such a duty existed, submitted the question of the college's liability to the jury . . . ." (Op. A5).

Not only the trial court, but also all of the parties assumed that the College had a duty to use reasonable care; the College argued only that the duty did not encompass off-campus activities unless the activity was inherently dangerous. The Court of Appeals in disregarding that universal principle ignored obviously applicable legal principles which none of the parties had controverted. This clearly constituted error.

Moreover, disregard of relevant case law in reliance only upon its conception of society in general and the college-student relationship in particular as it might be viewed by the state court as a matter of public policy also constituted error; an error which this Court of Appeals is particularly prone to indulge in.

It is the function of a federal court in a diversity case to rule on the basis of what the state law is, not what it will be, at least in the face of a clearly enumerated state rule, *Hausman v. Buckley, supra,* and to ascertain and apply state law not to formulate a legal mandate for the state. *Reeg v. Shaughnessey, supra.* The federal court should be reluctant to make departures from previously enunciated principles. *Amfac Mtg. Corp. v. Arizona Mail of Tempe, supra.* It is not the function of the federal court in a diversity case to predict state law. *Garris v. Schwartz, supra.*

While general policies expressed by state court decisions in other areas might well be considered where it is necessary for a federal court to conclude in the absence of controlling authority whether the case at hand falls within or without state law, especially where the only decisions are those of lower appellant courts, it is not the business of the Federal Court to judge the wisdom of state law *(Mills v. Hoflich, supra.)* and certainly not the business of the federal court to make policy for the state. The making of policy, it is submitted, should be reserved

to the state courts or, it is suggested, perhaps even the state legislative body.

Nevertheless the courts do engage in admitted policy making. In *Community Nat. Bank v. Fidelity & Deposit Co., supra.,* the court expanded state law to include tort liability of a surety company where a prior decision of a state court on the same facts had concluded there was no liability in a suit between the same parties, because it conceived a later intermediate state court decision as adopting a general policy of expanding tort liabilities so that the loss would fall upon a wrongdoer rather than innocent third parties.

In other decisions the Third Circuit Court of Appeals has admittedly expanded liability under state law solely on the most general policy grounds. In *Becker v. Interstate Properties,* 569 F.2d 1203 (3rd Cir. 1978), that court held that a landowner was liable to an injured construction worker for failing to see that the independent contractor which injured him was adequately insured, because it felt that prior New Jersey cases holding non-liability unless the subcontractor was incompetent should be expanded in the interest of a policy of "distributive justice" and shifting the burden of the loss. It is indeed noteworthy that there this same court relied upon the very same authority, the Restatement Section which is dismissed here as being incorrectly assumed, as a basis for finding an expanded duty to see that its subcontractor's were adequately insured. (Id. at 1211). In *Knapp v. N. American Rockwell,* 506 F.2d 361, 367 (3rd Cir. 1974), it acknowledged that under existing state law a successor corporation could not be liable in a products liability case, but found that successor liable because it was better able to bear the loss and because otherwise the injured claimant would go uncompensated, citing only instances in which the state court had clearly expanded tort law by doing away with governmental, interfamilial and charitable immunities. This Appellate Court feels that it is unduly narrow and

mechanical to determine issues of substantive right under state law without considering what it conceived to be the underlying principles and policies of the state. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 501 (3rd Cir. 1978). It relied again upon the same citations to find a new duty upon an employer to carefully maintain an employee's personnel records and to impose liability upon the employer for failure to do so. *Quinones v. United States*, 492 F.2d 1269, 1273, 1276 (3rd Cir. 1974).

By these decisions and by acknowledging reliance upon otherwise unrelated decisions in which a state court itself changed state law, the Third Circuit in effect acknowledge its engagement in the role of policymaking and its assumed authority to change applicable state law.

Even where the exercise of such authority is not acknowledged, the federal courts have ample room to in fact exercise that purported authority and engage in the role of policymaker by simply distinguishing on the facts or on the law otherwise relevant state court decisions and concluding that there is no controlling decision. There is ample room for a court in its opinion to recite a decision apparently in exact accord with prior state decisions by selection of the facts it states in its opinion or ignores, or as is the case here, by ignoring contentions which were made by the parties to the case and deciding the case on the basis of some other contention.

It is submitted that involvement of this Appellate Court in changing state law currently far exceeds that which should be permitted to it in diversity cases, and that such exercise in excess of the authority properly granted to it can only be controlled by this Court in accepting for review a case in which the propriety of the lower court's ascertainment and application of state law is at issue. The rights of the parties to this or any other litigation are, in the absence of such review, forever determined by the decision of the Court of Appeals, regard-

less of whether or not that decision is correct and regardless of whether or not the Court of Appeals embarks upon a change of state law for purely policy reasons.

It is submitted that it is among the pressing duties of this Court to supervise and control the administration of justice in diversity cases as well as in criminal, civil rights, and federal question cases. This duty the Court can only fulfill if it undertakes to review a case, such as this, where the determination and application of state law is at issue.

E. This Case is Appropriate for Determination of the Role and Function of Federal Courts in Determining and Applying State Law in Diversity Cases.

In this case the Court of Appeals has both expanded liabilities under state law by imposing a heretofore nonexistent liability upon a municipality for the then proper design and construction of its streets one-half century earlier, and narrowed existing law by exonerating a party from the common duty owed by all to exercise reasonable care in its own activities. In expanding liability it ignored applicable state law without discussion; and in exoneration it openly engaged in a generalized societal review and policy resolution, without reliance upon any state law or decision, on an issue which was never raised by any of the parties and not raised until appeal. In addition, this Court of Appeals has freely admitted its role in changing state law for purely policy reasons of the most generalized sort; openly placing reliance upon "distributive justice" and ability to bear the risk of loss rather than any conception of existing state law. The Court should therefore grant the Writ of Certiorari here prayed for to the end of examining the role of the Courts of Appeals in formulating state law and policy. Unless it does so the Courts of Appeals will continue to be free from any higher examination of the applicability and nature of the basis for decisions upon which the rights of those who come before the federal courts for justice depend.

II. THE DECISION OF THE APPELLATE COURT IMPOSING LIABILITY ON A MUNICIPALITY FOR PERSONAL INJURIES ATTRIBUTED TO A CONDITION INCORPORATED IN THE ORIGINAL CONSTRUCTION OF ITS STREETS FIFTY YEARS EARLIER WHERE THE DESIGN AND THE CONSTRUCTION OF THE STREET WAS ENTIRELY PROPER AT THAT TIME CONSTITUTES A CHANGE IN THE APPLICABLE STATE LAW AND PRESENTS A QUESTION OF GRAVE IMPORTANCE TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS AND TO ALL OF THE MUNICIPALITIES WITHIN THE TERRITORIAL LIMITS OF THE THIRD CIRCUIT COURT OF APPEALS BECAUSE ALL OF THOSE MUNICIPALITIES MUST NOW EITHER EMBARK UPON A COMPREHENSIVE AND PROHIBITIVELY COSTLY RECONSTRUCTION OF ALL OF THEIR STREETS OR PAY DAMAGES FOR ANY PERSONAL INJURIES WHICH ARE ATTRIBUTED TO ANY ASPECT OF THE STREET AS IT WAS ORIGINALLY BUILT.

The Borough of Doylestown is a municipality with a population of about nine thousand and an area of two and one half miles, built upon the crest of a hill with a steeply slopping water shed in two directions. The street in question and the other older streets of the Borough were built in the 1920's; these older sections were built without storm sewers and the streets were built containing depressions for the purpose of drainage of the run-off waters. The undisputed testimony of the plaintiffs' expert was that he could not say that the design of these streets was in any way improper at the time of their construction, and he was permitted to testify that the Borough should revamp its streets to lower the crown of this street and install closed culverts and a drainage system (R. 612a, 586a, 663a, 852a). The undisputed testimony

of both Bradshaw and the driver Rawlings was that they were each aware of the existence of these depressions and their effect on control of the auto from prior experiences in traversing them. Although neither Bradshaw nor Rawlings had any recollection of how this accident occurred, the accident was attributed to loss of control of the Rawlings automobile occasioned by crossing the second of a series of these depressions in the street along which Rawlings was driving.

At the trial Bradshaw contended that a sign warning of the existence of these depressions was not present on the day after the accident and that any sign should contain a warning as to a reduced speed as well as a warning of the existence of the depressions, and that the Borough could be liable either for failing to adequately warn or for the mere existence of the depression. The trial court by its instructions permitted the jury to impose liability upon the Borough upon either or both of those contentions.

The Borough contended on appeal that it could not be liable on a theory of failure to warn since Rawlings was admittedly and indisputedly aware of the condition and its effects upon his automobile and that it could not be liable for the mere existence of the depression since, under the applicable state law, a municipality is not liable for conditions incorporated in the initial design or construction of a street unless the design or construction is improper at that time. Such is the applicable law of the Commonwealth of Pennsylvania. *Travers v. Delaware County*, 280 Pa. 35, 124 Atl. 497 (1924); *Eichenhoffer v. Philadelphia*, 248 Pa. 365, 369, 93 Atl. 1065 (1915); *see Drew v. Laber*, 477 Pa. 297, 383 A.2d 941, 945 (1978) (Roberts, J., *dissenting*). Such is also the law of other jurisdictions. *See* 45 A.L.R. 3rd 875 (1970).

The Appellate Court rejected the Borough's contentions on these issues without dealing with either of them. In its Opinion (A17) it simply mistated the Borough's contention to be that the Borough's liability must

be predicated only on a theory that it was negligent in failing to warn for which it could not be held liable because Rawlings had notice of the dips, and then concluded that this supposed contention must be rejected because that theory was only one of several alternative theories advanced by the plaintiff against the Borough, the other being the Borough's negligence in creation and maintenance of the depressions where constructions of culverts could have done away with the existence of the depressions. The Appellate Court therefore apparently assumed the validity of the Borough's contention that it could not be held liable on a theory of lack of warning where there was in fact warning, and held, without any discussion, that it could be held liable for the initial, non-negligent, construction of its streets.

Such confession and avoidance constituted error. The jury was permitted by the instructions of the trial court to impose liability on that ground alone, and the trial court rejected the Borough's point for charge in accordance with its contention. The Borough was therefore entitled to a new trial regardless of the existence of alternative theories since under applicable law it could not be held liable on that theory which was submitted to the jury.

Under applicable state law, where a driver is aware of the existence of a condition the municipality is not liable either for failure to warn, because the driver is already warned, or for the existence of the condition because the driver's prior knowledge constitutes his act in encountering the known condition a superseding cause. *In Swartz v. Jaffey*, 324 Pa. 324, 188 Atl. 295 (1936) and *in Pivelis v. Plains Twp.*, 140 Pa. Super. 561, 14 A.2d 557 (1940), the municipality was held not liable as a matter of law where the driver lost control of his automobile while crossing a depression in the street because the driver was aware of the existence of the depression.

The affirmance of this verdict against the petitioning Borough constitutes error both in affirming a verdict where liability was submitted by the trial court to the jury on improper grounds and in the adoption by the Appellate Court of a change in the applicable state law permitting imposition of liability for a non-negligent condition of a street as originally constructed.

That the question of whether or not a municipality can be held liable for the manner in which it constructed its older streets many years ago is one of grave importance to all municipalities can hardly be doubted. If such liability is to be imposed, each municipality is faced with the prospect of either incurring the prohibitive burden of reconstructing these streets (in this case, installing culverts and storm sewers), or, if it fails to do so, paying damages for any personal injuries incurred which a jury may attribute to the existence of the streets as originally constructed. The burden of such a rule of law is amply illustrated in this case. The Borough here remains liable for and will be the sole source of collection of over one million dollars, after deduction of the one hundred dollars paid under the agreement between plaintiff and Rawlings (see Opinion of the trial court, (464 F.Supp. 175)). It is a borough of only nine thousand population. The amount of this verdict alone exceeds the entire budget of the Borough for an entire year; it will have to pay, in this case out of its own public coffers, an amount in excess of all of the taxes currently imposed upon its citizens. The costs of a reconstruction of its existing streets are equally prohibitive.

Although the issue of whether or not a municipality is liable under these circumstances was properly presented to it, the Appellate Court failed totally to consider or discuss either the applicable law or the arguments of the Borough; the Opinion contents itself with a mere reference to such liability as a possible alternate ground to

an erroneous theory of liability presented to the jury by the court below.

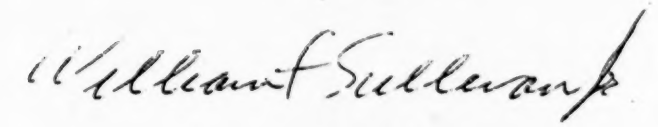
It is submitted that the issue of whether or not such liabilities are to be imposed upon a borough is on its face a matter of grave importance to any municipality, and the court's cavalier imposition of that liability without discussion or consideration constitutes an abdication by the court of its duties to properly interpret and rule upon important matters of state law. It is submitted that the Appellate Court's affirmance of this verdict is error, that at a very minimum the Borough is entitled to consideration and a ruling upon the important issue properly presented to the Appellate Court, and that a failure to compel review of that issue would be an abdication by this Court of its duties to supervise the proper functioning of the Courts of Appeals as the interpreters and appliers of state law. This Court should not permit the imposition of such liability upon the citizens of the petitioning Borough and municipalities in general without due consideration to their rights and their contentions.

CONCLUSION

The Court of Appeals erred in exonerating one defendant from liability on purely policy reasons while ignoring existing state law, relying upon an issue not raised by any of the parties either in the trial court or on appeal, and in imposing a new and devastating liability under state law upon all municipalities without giving any consideration to that state law. The imposition of that new liability upon municipalities presents an issue of grave importance to all municipalities.

This Court of Appeals has in this and previous cases assumed to itself the duty and right to change state law in reliance only upon the broadest policy of the state as the court conceived that policy. Unless this Court accepts for review a case in which the role of the lower federal courts in determining and applying state law is at issue it cannot fulfill its duty to supervise and control the administration of justice in the vast number of cases in which the litigants' rights are determined under state law in the federal courts, and the federal courts will be free to assume the policy and lawmaking functions which are properly reserved to state courts and legislatures, according to a particular federal court's conception of its desire and power to act as the law-giver for a state.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1409, 79-1410, 79-1411, and 79-1412

DONALD BRADSHAW, ALFRED CUNEO,
and CAROLE CUNEO, *Appellants, No. 79-1412*

v.

BOROUGH OF DOYLESTOWN,
Appellant, No. 79-1410
BRUCE D. RAWLINGS, DELAWARE VALLEY
COLLEGE, *Appellant, No. 79-1411*
MARJORIE E. MOYER t/a SUNNY BEVERAGES,
Appellant, No. 79-1412
MAENNERCHOR SOCIETY

APPEAL FROM FINAL JUDGMENT ENTERED BY
THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA, AND
FROM THE ORDER OF THE LOWER COURT
DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

Argued October 11, 1979

Before: ALDISERT and HUNTER, *Circuit Judges*,
and MEANOR, *District Judge*

OPINION OF THE COURT

(Filed December 17, 1979)

BRADSHAW, DONALD; CUNEO, ALFRED and CUNEO, CAROLE

v.

BRUCE D. RAWLINGS, GILBERT D. RAWLINGS, BOROUGH OF DOYLESTOWN, PENNSYLVANIA, DELAWARE VALLEY COLLEGE, MARJORIE E. MOYER, t/a SUNNY BEVERAGES, MAENNERCHOR SOCIETY, SAAB MOTOR COMPANY

MARJORIE MOYER t/a SUNNY BEVERAGES, *Appellant*, No. 79-1412

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 77-0048)

Argued October 11, 1979

Before: ALDISERT and HUNTER, *Circuit Judges*, and MEANOR, *District Judge*.

(Filed December 17, 1979)

OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The major question for decision in this diversity case tried under Pennsylvania law is whether a college may be subject to tort liability for injuries sustained by one of its students involved in an automobile accident when the driver of the car was a fellow student who had become intoxicated at a class picnic. Another question relates to the liability of the distributor who furnished beer for the picnic which led to the intoxication of the driver. Still another question concerns the tort liability of the municipality where the plaintiff's injuries occurred.

The district court permitted the question of negligence to go to the jury against the college, the beer distributor and the municipality. From an adverse verdict of $1,108,067 each of the defendants has appealed, advancing separate arguments for reversal. The plaintiff has filed a conditional cross-appeal.[1]

I.

Donald Bradshaw, an eighteen year old student at Delaware Valley College, was severely injured on April 13, 1975 in Doylestown, Pennsylvania, while a backseat passenger in a Saab automobile driven by a fellow student, Bruce Rawlings.[2] Both were sophomores and had attended their class picnic at a grove owned by the Maennerchor Society on the outskirts of the borough.[3]

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1. For convenience we refer to the plaintiff in the singular although joining the injured plaintiff, Donald Bradshaw, were his mother and stepfather who recovered $5,000 each.

2. Saab Motor Company, the manufacturer of the vehicle, and Gilbert Rawlings, the owner of the vehicle, were originally named as defendants but plaintiff voluntarily dismissed them.

3. Although originally named as a defendant, the Maennerchor Society is not a party to this appeal.

Returning to the college from the picnic, Rawlings drove through Doylestown on Union Street. Union Street is colloquially known as "Dip Street" because it was constructed with drainage dips, instead of sewers, to carry surface water runoff. While proceeding through one of the dips, Rawlings lost control of the automobile which then struck a parked vehicle. As a result of the collision Bradshaw suffered a cervical fracture which caused quadriplegia.

The picnic, although not held on college grounds, was an annual activity of the sophomore class. A faculty member who served as sophomore class advisor participated with the class officers in planning the picnic and co-signed a check for class funds that was later used to purchase beer. The advisor did not attend the picnic, nor did he get another faculty member to attend in his place. Flyers announcing the picnic were prominently displayed across the campus. They were mimeographed by the college duplicating facility and featured drawings of beer mugs. Approximately seventy-five students attended the picnic and consumed six or seven half-kegs of beer. The beer was ordered from Marjorie Moyer, trading as Sunny Beverages, by the sophomore class president who was underage.

The legal drinking age in Pennsylvania was, and is, twenty-one years, but the great majority of the students drinking at the picnic were sophomores of either nineteen or twenty years of age. Rawlings had been at the picnic for a number of hours. He testified that he had no recollection of what occurred from the time he left the picnic until after the accident. Bradshaw testified that Rawlings had been drinking and another witness, Warren Wylde, expressed his opinion that Rawlings was under the influence of alcohol when he left the picnic grove. That there was sufficient evidence on the question of Rawlings' intoxication to submit to the jury cannot be seriously questioned.

II.

On appeal, the college argues that Bradshaw failed to present sufficient evidence to establish that it owed him a duty for the breach of which it could be held liable in tort. The district court, apparently assuming that such a duty existed, submitted the question of the college's liability to the jury, stating:

> In any event, the college owes a duty to use due care under the circumstances to prevent an unreasonable risk of harm to sophomores who attend a class function. Restatement (Second) of Torts §§282 and 283 (1965) provide:
>
> §282. Negligence Defined
>
> In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest in others.
>
> §283. Conduct of a Reasonable Man: The Standard
>
> Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Bradshaw v. Rawlings, 464 F.Supp. 175, 181 (E.D.Pa. 1979). In its post-trial opinion, the district court attempted to justify this instruction by stating:

> I submitted this case to the jury on the above concept. The College was permitted to argue to the jury that it was not negligent because it was powerless to control the habits of college sophomores in regard to drinking beer. The jury rejected the College's defense that it acted in a reasonable manner under the

> circumstances. It should be noted that the College's liability is predicated on the concept of want of due care which a reasonable man would exercise under the circumstances.

Id.

A.

The college's argument strikes at the heart of tort law because a negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant. "Negligence in the air, so to speak, will not do."[4] As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection."[5] Thus, we may perceive duty simply as an obligation to which the law will give recognition in order to require one person to conform to a particular standard of conduct with respect to another person.

These abstract descriptions of duty cannot be helpful, however, unless they are directly related to the competing individual, public, and social interests implicated in any case. An interest is a social fact, factor, or phenomenon existing independently of the law which is reflected by a claim, demand, or desire that people seek to satisfy and that has been recognized as socially valid by authoritative decision makers in society.[6] Certainly,

4. F. Pollock, Law of Torts 468 (13th ed. 1929).

5. W. Prosser, Law of Torts 333 (3d ed. 1964).

6. *See, e.g.*, Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1 (1943); Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 Colum. L. Rev. 431, 441-47 (1930).

the plaintiff in this case possessed an important interest in remaining free from bodily injury, and thus the law protects his right to recover compensation from those who negligently cause him injury. The college, on the other hand, has an interest in the nature of its relationship with its adult students, as well as an interest in avoiding responsibilities that it is incapable of performing.

B.

Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment,[7] written[8] and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. For example, except for purposes of purchasing alcoholic beverages, eighteen year old persons are considered adults by the Commonwealth of Pennsylvania. They may vote,[9] marry,[10] make a will,[11] qualify as a per-

7. Section one of the twenty-sixth amendment to the United States Constitution provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

8. *See e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Papish v. Board of Curators*, 410 U.S. 667 (1973)(per curiam); *Healy v. James*, 408 U.S. 169 (1972); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

9. 25 P.S. §2811.

10. 48 P.S. §1-5.

11. 20 Pa. C.S. §2501.

sonal representative,[12] serve as a guardian of the estate of a minor,[13] wager at racetracks,[14] register as a public accountant,[15] practice veterinary medicine,[16] qualify as a practical nurse,[17] drive trucks, ambulances and other official fire vehicles,[18] perform general fire-fighting duties,[19] and qualify as a private detective.[20] Pennsylvania has set eighteen as the age at which criminal acts are no longer treated as those of a juvenile,[21] and eighteen year old students may waive their testimonial privilege protecting confidential statements to school personnel.[22] Moreover, a person may join the Pennsylvania militia at an even younger age than eighteen[23] and may hunt without adult supervision at age sixteen.[24] As a result of these and other similar developments in our society, eighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role *in loco parentis*. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by

12. 20 Pa. C.S. §3156.
13. 20 Pa. C.S. §5112.
14. 15 P.S. §2621.
15. 63. P.S. §9.8g.
16. 63 P.S. §485.9.
17. 63 P.S. §655.
18. 43 P.S. §48.3.
19. *Id.*
20. 22 Pa.C.S. §46.
21. 42 Pa. C.S. §§6302, 6303-18.
22. 42 Pa. C.S. §5945.
23. 51 Pa. C.S. §301 (seventeen years, six months).
24. 34 P.S. §1311.316.

the colleges and were an all-pervasive affirmative demand for more student rights.[25] In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, parietal visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties *in loco parentis,* colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will. In 1972 Justice Douglas summarized the change:

> Students — who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age — are adults who are members of the college or university community. Their interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.

25. *See generally Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Healy v. James,* 408 U.S. 169, 171 (1971); *See also* Report of the President's Commission on Campus Unrest (1970); Report of the American Bar Association Commission on Campus Government and Student Dissent (1970); S. Kelman, Push Comes to Shove: The Escalation of Student Protest (1970); A. Adelson, SDS (4th ed. 1970).

Healy v. James, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years. It could be argued, although we need not decide here, that an educational institution possesses a different pattern of rights and responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school. Under such circumstances, after weighing relevant competing interests, Pennsylvania might possibly impose on the institution certain duties of protection, for the breach of which a legal remedy would be available. *See, e.g., Chappel v. Franklin Pierce School District*, 71 Wash.17, 426 P.2d 471 (1967); *McLeod v. Grant County School District*, 412 Wash.316, 255 P.2d 360 (1953); Restatement (Second) of Torts §320 (1965).[26] But here, because the circumstances show

26. §320. Duty of Person Having Custody of Another to Control Conduct of Third Persons

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
>
> (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control.

that the students have reached the age of majority and are capable of protecting their own self interests, we believe that the rule would be different.[27] We conclude, therefore, that in order to ascertain whether a specific duty of care extended from Delaware Valley College to its injured student, we must first identify and assess the competing individual and social interests associated with the parties.

III.

A.

In the process of identifying the competing interests implicated in the student-college relationship, we note that the record in this case is not overly generous in identifying the interests possessed by the student, although it was Bradshaw's burden to prove the existence of a duty owed him by the college in order to establish a breach thereof. Bradshaw has concentrated on the school regulation imposing sanctions on the use of alcohol by students. The regulation states: "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action. The same rule will apply to every student regardless of age." App. at 726a-727a. We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of

27. For example, Restatement (Second) of Torts §315 (1965) states the general rule:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

imposing a duty of protection in this case. We assume that the average student arrives on campus at the age of seventeen or eighteen, and that most students are under twenty-one during the better part of their college careers. A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its students so as to make operative the provisions of §320 of the Restatement (Second) of Torts. *See* footnote 26, *supra*.

Thus, we predict that the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm. Absent proof of such a relationship, we do not believe that a prima facie case of custodial duty was established in order to submit the case to the jury on this theory.[28]

B.

We next examine the facts adduced at trial to determine whether a special relationship existed as a matter of law, which would impose upon the college either a duty to control the conduct of a student operating a motor vehicle off campus or a duty to extend to a student a right of protection in transportation to and from off campus activities. We conclude that Bradshaw also failed to meet his burden of proving either of these duties. Bradshaw's primary argument is that the college had knowledge that its students would drink beer at the picnic, that this conduct violated a school regulation and state law, that it created a known probability of harm to

28. *See Hegel v. Langsam*, 55 Ohio Op.2d 476, 273 N.E.2d 351 (1971).

third persons, and that knowledge by the college of this probable harm imposed a duty on the college either to control Rawling's conduct or to protect Bradshaw from possible harm.

Although we are aware of no Pennsylvania decision that has addressed this precise issue, the supreme court of that state has held that a private host who supplies intoxicants to a visibly intoxicated guest may not be held civilly liable for injuries to third parties caused by the intoxicated guest's negligence. *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). Only licensed persons engaged in the sale of intoxicants have been held civilly liable to injured parties, *id.* at 239, 310 A.2d at 76 (citing *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550 (1964)), and the source of this liability derives from the common law, *Corcoran v. McNeal*, 400 Pa. 161, A.2d 367 (1960), as well as from a violation of Pennsylvania's Dram Shop statute, 47 P.S. §4-493(1), *Majors v. Broadhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965). Because the Pennsylvania Supreme Court has been unwilling to find a special relationship on which to predicate a duty between a private host and his visibily intoxicated guest, we predict that it would be even less willing to find such a relationship between a college and its student under the circumstances of this case.[29]

29. We read the earlier superior court decision of *Pennsylvania v. Randall*, 183 Pa. Super. 603, 133 A.2d 276 (1957), *cert. denied*, 355 U.S. 954 (1958), to be inconsistent with the supreme court's subsequent decision in *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973). The superior court had interpreted "or other person" in the Dram Shop Act to mean persons other than licensees, their servants or employees. Using this interpretation, a private host could be held liable under the statute for serving minors. The supreme court's pronouncement in *Manning*, however, is diametrically opposed to that of the superior court: "Appellant asks us to impose civil liability on nonlicensed persons, like appellees, who furnish intoxicants for no remuneration. We decline to do so. While appellants' proposal may have merit, we feel that a decision of this monumental nature is best left to the legislature." 454 Pa. at 239, 310 A.2d at 76.

The centerpiece of Bradshaw's argument is that beer-drinking by underage college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and the means of exercising control over beer drinking by students at an off campus gathering. These contentions miss the mark, however, because they blur the distinction between establishing the existence of a duty and proving the breach thereof. Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity. Our national public policy, insofar as it is reflected by industry standards or by government regulation of certain types of radio-television advertising, permits advertising of beer at all times of the day and night even though Congress has banned advertisement of cigarettes[30] and the broadcasting industry has agreed to ban the advertisement of liquor.[31] What we know as men and women we must not forget as judges, and this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience. That this is true is not to suggest that reality always comports with state law and college rules. It does not. But the Pennsylvania law that prohibits sales to, and purchases by, persons under twenty-one years of age, is certainly not a universal practice in other countries[32],

30. 15 U.S.C. §1335.

31. National Association of Broadcasters, The Television Code 11 (19th ed. 1976); National Association of Broadcasters, The Radio Code 14 (20th ed. 1976).

32. For example, the legal age for drinking beer in Austria varies from state to state, ranging from fourteen to eighteen years; in Denmark, restaurants and hotels may not serve persons under eighteen; in England and Wales, a sixteen year old may purchase beer for consumption at a meal other than at a bar, otherwise the age requirement is eighteen; in France, minors less than sixteen years old may not enter bars unless accompanied by a parent or guardian, and must be eighteen in order to be served drinks strong-

nor even the general rule in North America.[33] Moreover in New Jersey, the bordering state from which the majority of Delaware Valley College students come, App. at 744a-746a, the legal drinking age is eighteen. Under these circumstances, we think it would be placing an impossible burden on the college to impose a duty in this case.

Without explicating its rationale in detail, the state of New York has also refused to impose liability upon an institution of higher learning under somewhat similar circumstances. *See Mintz v. New York*, 47 A.D.2d 570, 362 N.Y.S. 2d 619 (1975); *Rubtchinsky v. State University of New York*, 46 Misc.2d 679, 260 N.Y.S.2d 256 (1965); *Munson v. Board of Education*, 17 A.D.2d 687, 230 N.Y.S.2d 919 (1962). *See also Perkins v. State Board of Education*, 364 So.2d 183 (La. App. 1979).

NOTE 32 — *(Continued)*
er than beer or wine; in the Federal Republic of Germany, the legal age for drinking beer is sixteen and a juvenile over fourteen accompanied by an adult may buy or consume wine or beer in a public place; in Italy, the legal age is sixteen years; in the Netherlands, a hotel, restaurant or cafe may not sell beer to persons under sixteen but municipalities may prohibit by ordinance the sale to persons under twenty-one; in Norway, the legal age for drinking beer is eighteen, subject to the right of municipalities to impose tighter restrictions; in Sweden, the legal age is eighteen years; and in Switzerland, sixteen years. Legal Drinking Age in the United Kingdom and Continental Europe (November 1979) (Library of Congress Monograph, on file in the Library of the United States Court of Appeals for the Third Circuit, Pittsburgh Branch).

33. Of the fifty states and the District of Columbia only thirteen jurisdictions still retain the twenty-one year age requirement for the consumption of beer, while two require twenty years of age and nine, nineteen years. The remainder of the states permit beer drinking at age eighteen. Information, Please Almanac 822 (1979).

None of the Canadian provinces or territories retain the twenty-one year age minimum. Seven place the legal drinking age at nineteen, and five at eighteen. World Almanac 136 (1979).

Therefore, we conclude that Bradshaw failed to establish a prima facie case against the college that it should be charged with a duty of custodial care as a matter of law and that the district court erred by submitting the case to the jury.

IV.

Marjorie Moyer, the licensee who sold the beer to the minor students, is liable for injuries proximately resulting therefrom, *Jardine v. Upper Darby Lodge*, 413 Pa. 626, 198 A.2d 550 (1964), unless she can demonstrate circumstances that remove her from the strictures of the general rule. She attempts to meet the task by arguing that there was insufficient evidence of Rawlings' intoxication to supply the causal link between the sale and the injury. Her argument must fail because, as we have previously concluded, there was sufficient evidence to submit the issue of the driver's intoxication to the jury. Witness Wylde testified that he, Rawlings, and Bradshaw were at the picnic all afternoon, were among the last to leave, and that in his opinion, Rawlings was "high." When directly asked whether Rawlings was under the influence of alcohol as he drove his car from the picnic grounds towards Union Street, Wylde answered that he was. App. at 98a. Also significant was Rawlings' testimony that although not seriously injured in the accident, he had no recollection of any of the events from sometime near the end of the picnic until after the collision occurred. We therefore conclude that no exception removed licensee Moyer from the Pennsylvania general rule imposing liability under the circumstances of this case, in which the beer was ordered by an underaged member of the sophomore class for use at a sophomore class picnic. Although the delivery was signed for by a student of legal age, the beer distributor had reason to know that the great majority of drinkers who would consume the beer were underaged.

V.

The Borough of Doylestown argues that it should not be subject to liability because the negligence of Rawlings was a superseding cause as a matter of law. The district court ruled, however, that the question was a factual one and submitted it to the jury for resolution. This ruling was appropriate under the Pennsylvania law on superseding cause as set forth in *Estate of Flickinger v. Ritsky*, 452 Pa. 69, 75, 305 A.2d 40, 43 (1973):

> It is easily seen that this statement of the law, like the rules controlling the question of what conduct is negligent presents *fact questions* of its own force. An intervening negligent act will not be a superseding cause relieving the original negligent actor from liability *if* that actor at the time of his negligent act *should have realized* that another person's negligence might cause harm; or, if a *reasonable man* would not regard the occurrence of the intervening negligence as *highly extraordinary;* or, if the intervening act is not *extraordinarily negligent*. What the original actor should have realized and what a reasonable man would say was highly extraordinary are, of course, fact questions which must in the majority of cases be left to the jury.

Doylestown further argues that any liability extending to it must be predicated on the theory that it was negligent in failing properly to warn of the existence of dips and that it cannot be held liable of this theory because there was proof that Rawlings had notice of the dips. This argument must also fail because failure to warn was only one of several alternative theories advanced by the plaintiff against the borough. Plaintiff argued and supplied sufficient evidence for the jury to find that Doylestown was negligent in creating and maintaining the dips, which presented an unreasonable risk of harm to the public. Evidence tended to show that sim-

ple culverts could have completely done away with the dangerous dips, that the borough failed to lower the speed limit on Union Street to a safer speed, and that it failed to place stop signs at the preceding intersection as an alternative safety measure.

VI.

Bradshaw's cross-appeal is conditioned on our granting a new trial in favor of the appellants. He asks this court not to apply the leading Pennsylvania appellate decision in *Havens v. Tonner*, 243 Pa. Super. 371, 365 A.2d 1271 (1976), previously followed by this court in *Vizzini v. Ford Motor Co.*, 569 F.2d 754 (3d Cir. 1977), which holds that evidence of inflationary trends may not be introduced on damage awards. Because we are uncertain whether the cross-appeal is still being pressed in the face of our partial reversal of the district court's judgment, we meet this contention on the merits and conclude that the district court did not err. We rely on our statement in *Vizzini*, in which Chief Judge Seitz, writing for the court, stated:

> The Supreme Court of Pennsylvania has not yet considered whether or in what manner inflation or productivity increases may be accounted for in damage awards. . . . But we believe that a recent decision of the Pennsylvania Superior Court, *Havens v. Tonner* . . . is evidence of the thinking of the Pennsylvania courts on this point.
>
> In *Havens*, the Pennsylvania Superior Court held that evidence of increased productivity, was "simply a substitute for inflation and equally speculative and inadmissible in a calculation of future earnings," *id.* at 378, 365 A.2d at 1274. The Court went on to say that
>
> > [a]ny estimate of future earnings over a substantial period of years based upon economic predictions is necessarily extremely speculative in nature. Much more satisfactory is evidence of the earning potential of the individual in question.
>
> 243 Pa.Super. at 380, 365 A.2d at 1275. Thus, evidence of increased productivity should not be admitted at a new trial.

569 F.2d at 768.

VII.

The judgment of the district court will be affirmed in all respects except that part imposing liability against Delaware Valley College, which we reverse and direct that a judgment in favor of Delaware Valley College be entered. Accordingly, the judgment of the district court will be affirmed at Nos. 79-1409, 79-1410, and 79-1412; the judgment of the district court at No. 79-1411 will be reversed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1409, 79-1410, 79-1411, and 79-1412

DONALD BRADSHAW, ALFRED CUNEO, and
CAROLE CUNEO, *Appellants, No. 79-1409*

v.

BRUCE D. RAWLINGS, et al.
BOROUGH OF DOYLESTOWN,
Appellant, No. 79-1410
DELAWARE VALLEY COLLEGE,
Appellant, No. 79-1411
MARJORIE MOYER t/a SUNNY BEVERAGES,
Appellant, No. 79-1412

(D.C. Civil Action No. 77-0048)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT and HUNTER, *Circuit Judges* and
MEANOR, *District Judge*

JUDGMENT

This cause came on to be heard on the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 11, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 11, 1979, be, and the same is hereby affirmed at Nos. 79-1409, 79-1410 and 79-1412; and the judgment is reversed at No. 79-1411 with direction that a judgment be entered in favor of Delaware Valley College.

ATTEST:

THOMAS F. QUINN
Clerk

December 17, 1979

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1409/10/11/12

BRADSHAW, DONALD, et al. v.
BRUCE D. RAWLINGS, et al.
BRADSHAW, DONALD, et al., *Appellants, No. 79-1409*
BOROUGH OF DOYLESTOWN,
Appellant, No. 79-1410
DELAWARE VALLEY COLLEGE,
Appellant, No. 79-1411
MARJORIE MOYER, etc., *Appellant, No. 79-1412*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS,
GIBBONS, ROSENN, HUNTER, WEIS, GARTH,
HIGGINBOTHAM and SLOVITER, *Circuit Judges*,
and MEANOR, *District Judge**

The petition for rehearing filed by Appellant, Borough of Doylestown in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: January 21, 1980

*Honorable H. Curtis Meanor, of the United States District Court for the District of New Jersey, sitting by description.